



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 19, 1998

Mr. Kevin McCalla
Director, Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR98-1510

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 115949.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for records pertaining to Rescar, Inc. Specifically, the requestor seeks:

All documents including without limitation all correspondence, compliance, application, civil and criminal enforcement, and other files maintained by or at the Texas Natural Resource Conservation Commission or any of its district or regional offices which relate or pertain to Rescar, Inc., Rescar Cleaning Corporation, and/or any of Rescar's facilities.

You state that the commission has released some of the requested information. You contend, however, that two categories of documents are excepted from required public disclosure pursuant to section 552.101 of the Government Code, in conjunction with section 382.041 of the Health and Safety Code, and section 552.110 of the Government Code as "trade secrets."

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision." (Emphasis added.) Section 382.041(a) of the Health and Safety Code provides:

Except as provided by Subsection (b), a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted.

In Open Records Decision No. 652 (1997), this office determined that the definition of a trade secret contained in the Restatement of Torts and adopted by the Texas Supreme Court for use in common-law trade secret actions is the appropriate standard to use when determining if information is "relating to the secret processes or methods of manufacture or production" under section 382.041 of the Health and Safety Code. Accordingly, information is protected under section 382.041 if 1) it is established that the information is a trade secret under the definition set forth in the Restatement of Torts, and 2) the information was identified as confidential by the submitting party when it was submitted to the commission. Similarly, section 552.110 of the Government Code excepts from public disclosure "trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Because this office also looks to the Restatement of Torts definition of "trade secrets" when making determinations under section 552.110 of the Government Code, we will consider the applicability of these two provisions together.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). Moreover, there are six factors to be assessed when determining whether information qualifies as a trade secret.¹

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

This office must accept a claim that information is excepted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. However, where no evidence of the factors necessary to establish a trade secret claim is made, we cannot conclude that the trade secret exception applies. Open Records Decision No. 402 (1983). First, you indicate that the two groups of documents you seek to withhold were marked as confidential when submitted to the commission. Second, although you have made general assertions that the information is protected trade secret information, we do not believe you have established a prima facie case that the information at issue constitutes trade secrets under the factors stated above. See Open Records Decision Nos. 552 (1990) at 5 (party must establish prima facie case that information is trade secret), 542 (1990) at 3.

You have, nonetheless, also requested an open records decision from this office pursuant to section 552.305 of the Government Code. In accordance with the practice this office established in Open Records Decision No. 575 (1990), we notified representatives of Rescar, Inc. that we received your request for an open records decision regarding its information. In our notification, this office requested an explanation as to why the information at issue was excepted from public disclosure, with the caveat that unless we received such explanation within a reasonable time this office would instruct the commission to disclose the information.

More than fourteen days have elapsed since this office issued its notice, and Rescar, Inc. has failed to provide this office with any explanation as to why the requested documents should not be released. Consequently, we cannot conclude that the information at issue constitutes trade secret information. See Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish prima facie case that information is trade secret), 542 (1990) at 3. Because neither you nor Rescar, Inc. have demonstrated to this office that the information should be withheld, the commission must release the requested information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/rho

Ref: ID# 115949

Enclosures: Submitted documents

cc: Mr. Kenneth Krock
Nelkin & Nelkin
P.O. Box 86303
Houston, Texas 77203
(w/o enclosures)

Mr. David R. Hirschey
Corporate Manager
Rescar, Inc.
7702 FM 1960 E., Suite 108
Humble, Texas 77346
(w/o enclosures)